

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

RICHARD A. DAVIS,

Defendant.

CASE NO. 8:08CR47

TENTATIVE FINDINGS

The Court has received the Presentence Investigation Report (“PSR”) and the Defendant’s objections thereto (Filing No. 77). The government adopted the PSR (Filing No. 76). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant's objections are discussed below.

¶¶ 13, 16, 17 - Government's Version of the Offense

The Defendant objects to the above-stated paragraphs in the government's version of the offense, specifically to information relating to the number of images and sadistic or masochistic conduct. The Court is not at liberty to change a party's version of the offense, and the objections are denied.

¶ 28 - § 2G2.2(b)(7)(D) - Enhancement for Number of Images

Paragraph 28 includes a 5-level enhancement for the 4,025 images of child pornography attributed to the Defendant. The objection will be heard at sentencing, and the government has the burden of proof by a preponderance of the evidence.

¶ 25 - § 2G2.2(b)(2) - Enhancement for Prepubescent Minor, etc.

Paragraph 25 includes a 2-level enhancement for material involving a prepubescent minor who was under 12 years of age. The Defendant's objection to this paragraph appears to be untimely as according to the Addendum to the PSR it was apparently not communicated to the probation officer before the final version of the PSR was prepared. (Filing No. 68, ¶ 4.) Therefore, the Court declines to address the objection, which is denied. NECrimR 32.1(b)(6).

¶ 26 - § 2G2.2(b)(4) - Sadistic or Masochistic Conduct

The Defendant objects to the 4-level enhancement for sadistic or masochistic conduct. The objection was apparently not communicated at the appropriate time to the probation officer (Filing No. 68, ¶ 4), and therefore the objection is denied.

¶¶ 9, 43 - Factual Information

The information to which the Defendant objects does not affect the sentencing guideline range, and the objections were apparently not timely presented to the probation officer. The objections are denied.

The Defendant's motion for downward departure (Filing No. 78) will be heard at sentencing.

IT IS ORDERED:

1. The Defendant's objection to ¶ 28 will be heard at sentencing, and otherwise the Defendant's objections (Filing No. 77) to the PSR are denied;
2. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;

3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;

4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final;

5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing; and

6. The Defendant's motion for downward departure (Filing No. 78) will be heard at sentencing.

DATED this 22nd day of May, 2009.

BY THE COURT:

s/ Laurie Smith Camp
United States District Judge